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September 21, 2004

T.R.A. DOCKET ROOM

IN RE: Complaint of XO Tennessee, Inc
Against BellSouth and Request for
Expedited Ruling and for Interim Relief

) Docket No. 04-00306
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)
)

**COMPLAINT OF XO TENNESSEE, INC. AGAINST BELL SOUTH AND
REQUEST FOR EXPEDITED RULING AND FOR INTERIM RELIEF**

XO Tennessee, Inc. ("XO"), pursuant to T.C.A. §§ 65-4-104, 65-4-117, 65-5-208(c), and 65-5-210(a), files the following Complaint against BellSouth Telecommunications, Inc. ("BellSouth") seeking (1) an emergency order requiring BellSouth to immediately process all of XO's requests to convert circuits from special access billing to UNE billing; (2) the establishment of an interim rate for such conversions; and (3) an order setting an expedited schedule for hearing and resolving this Complaint.

PARTIES

1. Petitioner XO is a certified local exchange carrier providing service in competition with BellSouth in various locations throughout Tennessee. XO's business address is:

XO Tennessee, Inc
105 Molloy St., Suite 300
Nashville, TN 37201

2. BellSouth is an incumbent local exchange carrier providing telecommunications services in a nine-state region including Tennessee. BellSouth's official business address is:

BellSouth Telecommunications, Inc.
333 Commerce St
Nashville, TN 37204

JURISDICTION

3. The Tennessee Regulatory Authority (“TRA”) has jurisdiction to hear this complaint under T.C.A. §§ 65-4-104, 65-4-117, 65-5-208(c), and 65-5-210(a).

FACTUAL BACKGROUND

4. XO has repeatedly requested that BellSouth process the billing change required to convert special access lines (loops obtained from BellSouth pursuant to BellSouth’s special access tariffs) to UNE loops (loops obtained from BellSouth as unbundled network elements). This conversion is essentially a billing change. It does not require any physical alteration to the circuit and should be priced at a cost-based rate established by the TRA.¹

5. BellSouth responded that before it would process the requested conversions, XO would be required to: (1) pay the full nonrecurring charge to disconnect (D order) each special access circuit; (2) pay the full nonrecurring charge to install each UNE circuit (N order); and (3) in order to have BellSouth “coordinate” these orders (purportedly to avoid a lapse in end user service), pay a “Project Management Fee”—all in order to make what amounts to a billing change. In fact, BellSouth has acknowledged that the actual D and N orders are not required, and that the Project Management Fee is required so that the BellSouth Professional Services group could “coordinate these orders so that the ‘D’ order is not physically worked ... [and] the ‘N’ order flows through the

¹ Such pricing is consistent with the requirements of the Triennial Review Order (“TRO”), discussed below, which find that conversions like the ones at issue in this complaint are only a billing change, which must be made at a just and reasonable rate

systems so that XO can reuse the [same] facility.” See July 21, 2004 letter from Scott Kunze to Dana Shaffer, p. 1, par 3, attached as Exhibit A.

6. BellSouth’s proposed fees for the requested conversions, including nonrecurring charges and Project Management Fees, total approximately one thousand dollars (\$1,000.00) per circuit.² BellSouth’s demand that XO pay these fees for a billing conversion without interruption in service results, in effect, in denying XO the ability to convert these special access lines to UNE loops. This denial costs XO tens of thousands of dollars each month.

7. Further, despite the fact that XO has raised the conversion issue with BellSouth and clearly noted that it disagrees with BellSouth on this issue, BellSouth has refused to process XO’s conversion requests and then permit XO to dispute such charges before the TRA. Instead, prior to processing the conversions, BellSouth insists that XO sign a contract with BellSouth in which XO waives its right to dispute such charges. Finally, BellSouth is attempting to force XO to execute a “TRO amendment” to its interconnection agreement before it will process the conversion orders—an amendment that would deny XO the right to order DSI UNE loops (the same circuits that XO is seeking to convert), and, thus, render these conversion requests moot.

DISCUSSION

8. It is critical to remember that there is no *physical* disconnection or installation required to convert a circuit from special access billing to UNE billing as XO has requested. The FCC has found that the ability to convert between wholesale services and UNEs or UNE combinations should be a seamless process that does not affect the

² See BellSouth’s letter of July 21, 2004, attached as Exhibit A, demanding payment of full disconnection and installation nonrecurring charges, plus a Project Management Fee of \$635 83 for “project management with order provisioning,” to process each circuit conversion as a “switch as is” order

customer's perception of service quality.³ In this instance, however, BellSouth is attempting to extract a premium for what should be a "seamless process." This has the practical effect of denying XO access to conversions, while permitting BellSouth to maintain higher special access revenue for those circuits.

9. Even if, as BellSouth claims, its current processes require both a "D" order and an "N" order to be entered into its separate systems, but not physically worked, XO should not be charged the full nonrecurring charges for what are, in essence, "phantom" orders necessitated by BellSouth's inefficient systems.⁴ The nonrecurring charges for "D" and "N" orders are intended to recover the actual charge of a *physical* disconnection and installation, which, as BellSouth admits, is not required here. BellSouth simply requires two orders to reflect the nature of the circuit in its billing systems. This is not unlike the conversion of a special access mileage circuit to a UNE loop/transport combination, for which the BellSouth "switch as is" charge is only \$52.73 first/ \$24.62 additional.⁵

10. The rate for converting between wholesale services and UNEs or UNE combinations must be "just and reasonable." The FCC recognized that such conversions are not required by incumbents in order to serve their end user customers, and that those

³ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al*, CC Docket No. 01-338, *et al*, Federal Communications Commission ("FCC") 03-36 (rel. Aug. 21, 2003) ("TRO"), ¶ 587, fn 1809. "We note that no party seriously contends that it is technically infeasible to convert UNEs and UNE combinations to wholesale services and vice versa."

⁴ BellSouth's letter of July 21, 2004 (Exhibit A) clearly indicates that the "disconnect" is processed in one service center while the "install" is processed in another and BellSouth wants to charge XO to "manage" these paper changes so the order is not "physically worked." BellSouth attempts to complicate what is just a billing change.

⁵ In other BellSouth states, the "switch as is" rate is much lower, even though, presumably, the same BellSouth centers process conversion orders for circuits in those states as those processing conversion orders for circuits in Tennessee. The "switch as is" rate in Florida, for example, is \$8.98. Even assuming BellSouth's Tennessee "switch as is" charge of \$52.73 is reasonable, it is a far cry from the rate of approximately \$1,000.00 BellSouth is demanding for the conversions at issue in this complaint.

incumbents might attempt to deter such CLEC conversions for CLECs and unjustly profit from them:

We recognize, however, that a once a competitive LEC starts serving a customer, there exists a risk of wasteful and unnecessary charges, such as termination charges, re-connect and disconnect fees, or non-recurring charges associated with establishing a service for the first time. We agree that such charges could deter legitimate conversions from wholesale services to UNEs or UNE combinations, or could unjustly enrich an incumbent LEC as a result of converting a UNE or UNE combination to a wholesale service.⁶ Because incumbent LECs are never required to perform a conversion in order to continue serving their own customers, we conclude that such charges are inconsistent with an incumbent LEC's duty to provide nondiscriminatory access to UNEs and UNE combinations on just, reasonable, and nondiscriminatory rates, terms and conditions.⁷ Moreover, we conclude that such charges are inconsistent with section 202 of the Act, which prohibits carriers from subjecting any person or class of persons (*e.g.*, competitive LECs purchasing UNEs or UNE combinations) to any undue or unreasonable prejudice or disadvantage.

11. The FCC further stated: "We recognize, however, that converting between wholesale services and UNEs (or UNE combination) is largely a billing function. We therefore expect carriers to establish appropriate mechanisms to remit the correct payment after the conversion request, such as providing that any pricing changes start the next billing cycle following the conversion request."⁸

12. Thus, the language of the *TRO* discussed above, which was not affected by the vacatur of *USTA II*⁹, is clear: conversion of special access circuits to unbundled network elements is a billing change only, and the charge for such a change must be at a just and reasonable rate. Furthermore, the FCC has noted that "conversions should be performed in an expeditious manner"¹⁰

⁶ *TRO*, ¶ 587 (citing AT&T Reply at 296-300, AT&T Nov. 23, 2002 *Ex Parte* Letter at 12-13)

⁷ *TRO*, ¶ 587 (citing 47 U.S.C. § 251(c)(3))

⁸ *TRO*, ¶ 588 (emphasis added)

⁹ *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*")

¹⁰ *TRO*, ¶ 588

13. BellSouth has ignored these precepts and is attempting to charge XO for these conversions at rates that are so high that XO is unable to make the conversions at all.

CONCLUSION

14. XO continues to be irreparably harmed each day that BellSouth denies it the ability to process these conversions. XO has already experienced several months of harm in this matter, and cannot continue to unfairly absorb this loss due to BellSouth's intentional delay. If this dispute is not processed quickly, XO will continue to be unable to convert its special access lines, and BellSouth will be allowed to continue to artificially inflate XO's costs, thereby impacting XO's ability to compete. In addition, BellSouth continues to refuse to act reasonably to process the conversions and allow the parties to present the rate issue to the TRA. Instead, BellSouth insists that, in order to obtain access to the conversions, XO must sign a contract waiving its rights to dispute the charges BellSouth seeks to impose.

15. XO is effectively prohibited from processing any conversions due to the unreasonable rates BellSouth has demanded. As noted above, every day that XO cannot process these orders costs XO thousands of dollars. Under the circumstances set forth above, XO is entitled to interim relief and asks the TRA to issue an order directing BellSouth to make the conversions requested by XO at a just and reasonable interim rate, pending the issuance of a final decision on this complaint. The appropriate rate for interim purposes is \$52.73 first/ \$24.62 additional, which is the current "switch as is" charge for the conversion of special access circuits to Enhanced Extended Loops (EELs), or UNE loop/transport combination. This rate is reflected in the Parties' current interconnection agreement rate amendment, executed February 26, 2003. XO further

requests an expedited ruling on the merits of the complaint and determination of a final rate for such conversions.

WHEREFORE, XO prays that the TRA:

1. Enter an order requiring BellSouth to file a response to this complaint within ten days and scheduling a hearing on this complaint within thirty days
2. Require BellSouth to immediately process the pending conversions described in this complaint, and any future requests within one billing cycle of a conversion request, at an interim rate of \$52.73 first/ \$24.62 additional
3. Establish a permanent conversion rate for BellSouth and order a retroactive true-up applicable to all XO conversion requests.
4. Require BellSouth to credit XO for the difference between the special access rate and the UNE loop rate for each circuit for which XO has requested conversion. The amount of the credit should be calculated as if the conversion had occurred one billing cycle after the conversion request.
5. Grant such further relief as the TRA deems just and proper.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on Guy Hicks electronically and via U.S. Mail this 21st day of September 2004.

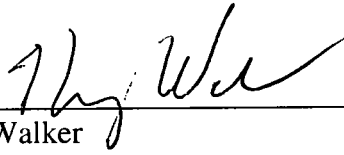

Henry Walker

EXHIBIT A

July 21, 2004

Ms. Dana Shaffer
Vice President
XO Communications
105 Molloy Street
Suite 300
Nashville, Tennessee 37201

Dear Dana:

This is in response to your e-mail dated July 13, 2004, regarding XO Communications' (XO) request to migrate thirty (30) Global Crossing Special Access (SPA) DS1s to XO Unbundled Network Element (UNE) DS1s.

Let me first address your statement, "XO should be able to do the conversion of GC [Global Crossing] SPA to XO SPA, then have Bell simply convert the pricing on the new XO circuit from SPA to UNE for a simple billing change charge." BellSouth has neither stated that XO cannot, on its own, provide a "D" order and "N" order to move GC's SPA DS1s to XO's DS1s, nor that XO cannot provide a "D" order and an "N" order to move XO's SPA DS1s to XO's UNE DS1s. BellSouth does, however, disagree with your assessment that BellSouth simply "converts" the pricing of the XO circuit from SPA to UNE as a DS1. The purpose of my previous correspondence was to inform you that BellSouth could not sign the Professional Services agreement as it stood with a misquoted price for the services discussed. I provided to you that notice and the additional pricing for Professional Services to coordinate both the GC SPA DS1 to XO SPA DS1 and the XO SPA DS1 to XO UNE DS1

As you are well aware from previous requests to migrate XO's single Special Access (SPA) circuits to UNEs, the process to fulfill XO's request is not "simply" a billing change. To refresh your recollection, I have attached documentation exchanged between BellSouth and XO since as early as May 13, 2002, regarding XO's previous requests to migrate individual SPA circuits to UNE circuits. This process, as previously described to you, entails provisioning the special access disconnect ("D") in the Access Customer Advocacy Center (ACAC), while the provisioning of the unbundled loop new connect/add order is performed by the Customer Wholesale Interconnection Network Services (CWINS). For this process, Professional Services can coordinate these orders so that the "D" order is not physically worked. Moreover, the "N" order flows through the systems so that XO can reuse the facility. Because these two classes of service are maintained in two separate systems, and provisioning and maintenance is conducted by two different centers, the steps to migrate from SPA to UNE cannot be achieved with a "simple billing change" as you indicate in your letter. BellSouth Professional Services can coordinate this process in addition to the process of coordinating the "N" and "D" orders related to moving Global Crossing's SPA DS1s to XO's network.

As BellSouth understands it, XO is requesting an after normal business hours migration of thirty (30) of Global Crossing's SPA DS1s to XO as UNEs. As explained in my July 13, 2004 letter, the executed Special Assembly was to achieve the after hours migration of Global Crossing's SPA DS1s to XO SPA DS1s. The price quoted in the Professional Services Agreement currently being negotiated, is solely to project manage the migration of XO's 30 new SPA DS1s to UNE DS1s. As detailed in my previous letter, there was an error in

the price quoted to perform the work necessary to achieve migration of XO's SPA DS1s to UNE DS1s. It took BellSouth four weeks to respond to XO's redline because due diligence was needed to address XO's changes and review all of the appropriate documentation germane to XO's request as it was an unusual request where it is not a like-for-like migration from one CLEC to another CLEC (i.e., SPA to SPA). The process for this is to migrate the SPA circuits to the second CLEC's SPA arrangement and then move from SPA to UNE. At this time, this can only be done through "N" and "D" orders as your Interconnection Agreement does not allow for a conversion from SPA to UNE; however, you can coordinate the "N" and "D" orders with a Professional Services agreement.

I would like to point out that Professional Services offers this service in lieu of XO having to expend its own resources to conduct the migration of services. Such migrations of services can be handled through XO's issuance and coordination of its own disconnects and new connect orders, without BellSouth's facilitation;

BellSouth has now provided quotes to XO to project coordinate both the SPA-to-SPA and the SPA-to-UNE migrations. Please respond within seven (7) calendar days to accept or reject BellSouth's current price quote as follows:

1. GC SPA to SPA -- \$135.00 per circuit
2. XO SPA to UNE -- \$347.48 per circuit
3. XO SPA to UNE with order provisioning -- \$635.83 per circuit

Consistent with your comments concerning updating XO's Interconnection Agreement, I have discussed this with your contract negotiator, Dorothy Farmer. It is my understanding that an amendment to your existing interconnection agreements to incorporate the Federal Communications Commission's (FCC) Triennial Review Order (TRO)¹ was sent by BellSouth to XO on December 9, 2003. Subsequent to sending these amendments, on February 18, 2004, BellSouth and XO agreed to negotiate a regional Interconnection Agreement to replace XO's existing Interconnection Agreements. As a part of the agreement reached on February 18, 2004, the parties agreed to negotiate Attachment 2 – Unbundled Network Elements ("UNEs") - first so that the agreed-upon TRO provisions could be used to amend the parties' existing Interconnection Agreements. BellSouth stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders (including the TRO and the D.C. Circuit Court's vacatur Order²).

Please feel free to call me, if there are additional questions.

Sincerely,

Scott Kunze
BellSouth Account Manager
Interconnection Sales

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos 01-338 et al, FCC 03-36, 18 FCC Rcd 16978 (Aug 21, 2003) ("TRO")

² *UNITED STATES TELECOM ASSOCIATION v FEDERAL COMMUNICATIONS COMMISSION and United States of America* (359 F.3d 554) March 2, 2004 ("DC Circuit Court Order")